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 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION
 12

13 MARC OPPERMAN, et al.,
 14 Plaintiffs,
 15 v.
 16 PATH, INC., et al.,
 17 Defendants.

Case No.: 13-cv-00453-JST

**PATH, INC.'S PARTIAL MOTION TO
 DISMISS SECOND CONSOLIDATED
 AMENDED CLASS ACTION COMPLAINT**

DATE: December 2, 2014
 TIME: 2:00 p.m.
 COURTROOM: 9
 JUDGE: Hon. Jon S. Tigar

**THIS DOCUMENT RELATES TO THE
 FOLLOWING CASES:**
Opperman v. Path, Inc., No. 13-cv-00453-JST
Hernandez v. Path, Inc., No. 12-cv-1515-JST

1 **PATH, INC.'S NOTICE OF MOTION AND PARTIAL MOTION TO DISMISS**
2 **SECOND CONSOLIDATED AMENDED CLASS ACTION COMPLAINT**

3 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

4 **PLEASE TAKE NOTICE** that on December 2, 2014 at 2:00 p.m., or as soon thereafter
5 as available, in the courtroom of the Honorable Jon S. Tigar, located at 450 Golden Gate Avenue,
6 San Francisco, California, 94102, Courtroom 9, Defendant Path, Inc. will and hereby does move
7 for an order dismissing Count II for Conversion of Plaintiffs' Second Consolidated Amended
8 Class Action Complaint (the "SCAC") under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of
9 Civil Procedure and Article III of the United States Constitution. This Motion is based on this
10 Notice of Motion and Motion, the Memorandum of Points and Authorities, the Court's files in
11 this action, the arguments of counsel, and any other matter that the Court may properly consider.

12 Dated: August 22, 2014

FENWICK & WEST LLP

13 By: /s/ Tyler G. Newby
14 Tyler G. Newby

15 Attorneys for Defendant
16 PATH, INC.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 After more than two years of pleadings and dismissal of all but one of their claims against
3 Path, Plaintiffs once again defy established case law by alleging that Path converted their digital
4 contacts by “accessing,” “copying” and “using” them. Plaintiffs do not allege Path dispossessed
5 them of their contacts, nor can they. What is more, Plaintiffs do not allege they suffered any
6 cognizable injury from Path’s alleged copying of their digital contacts to help them identify
7 friends on Path’s social network, even though that was the basis on which this Court previously
8 dismissed their conversion claim. *See* Dkt. No. 67 at pp. 38-39. The SCAC alleges no new facts
9 and no different theories that could support a finding Plaintiffs suffered an injury-in-fact, and the
10 conversion claim should again be dismissed for failure to plead Article III standing.

11 Even if they did have standing, Plaintiffs’ conversion claim against Path should be
12 dismissed under Rule 12(b)(6) for failure to allege complete dispossession of their digital
13 contacts. The Ninth Circuit has recognized that intangible property, like Plaintiffs’ contacts, is
14 subject to the tort of conversion only in limited circumstances: “[1] First, there must be an interest
15 capable of precise definition; [2] second, it ***must be capable of exclusive possession or control***;
16 and [3] third, the putative owner must have established a legitimate claim to exclusivity.”
17 *Kremen v. Cohen*, 337 F.3d 1024, 1030–31 (9th Cir. 2003) (internal citation omitted) (emphasis
18 added) (Internet domain name “sex.com” was capable of exclusive possession or control); *see*
19 *also Cardonet, Inc. v. IBM Corp.*, No. C-06-06637 RMW, 2008 WL 941707 (N.D. Cal. Apr. 7,
20 2008) (tort of conversion “requires the wrongful exercise of dominion over another’s property
21 [and] this requires some deprivation of ownership”). Plaintiffs allege only that Path accessed,
22 copied and “made use of” their contacts. *E.g.*, SCAC ¶¶ 155, 263 (alleging Defendants “made
23 use of” Plaintiffs’ contacts). These allegations are insufficient to allege complete deprivation of
24 their property, and Plaintiffs’ conversion claim should be dismissed on this alternative ground.

25 Rather than adding more pages in support of Path’s motion to dismiss Plaintiffs’
26 conversion claim, Path hereby adopts and incorporates by reference fully herein the Article III
27 and Rule 12(b)(6) arguments for dismissal of that claim as set forth in the motions to dismiss filed
28 by Twitter, Inc. (Dkt. No. 493), Yelp Inc. (Dkt. No. 495), Electronic Arts, Chillingo, Rovio and

1 ZeptoLab (Dkt. No. 497), Gowalla, Inc. (Dkt. No. 498), Instagram, LLC (Dkt. No. 499), Kik
2 Interactive, Inc. (Dkt. No. 500). Because Plaintiffs have already been given multiple
3 opportunities to state a claim for conversion, and further amendment will not cure the defects in
4 the SCAC, dismissal of the conversion claim against Path with prejudice is appropriate. *See, e.g.,*
5 *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (a court “may in its
6 discretion deny leave to amend ‘due to . . . repeated failure to cure deficiencies by amendments
7 previously allowed, . . . [and] futility of amendment.’”) (quoting *Leadsinger, Inc. v. BMG Music*
8 *Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008)).

9
10 Dated: August 22, 2014

FENWICK & WEST LLP

11 By: /s/ Tyler G. Newby
12 Tyler G. Newby

13 Attorneys for Defendant
14 PATH, INC.